APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 98-2527

EASTERN ASSOCIATED COAL COMPANY,
Plaintiff-Appellant,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of West Virginia, at Charleston
No. CA-97-819-2
John T. Copenhaver, Jr., District Judge

Argued May 6, 1999
Decided Aug. 20, 1999

Before WIDENER, ERVIN, and WILKINS, Circuit Judges.

OPINION

PER CURIAM.

Eastern Associated Coal Company ("Eastern") appeals a district court order granting summary judgment to

United Mine Workers of America, District 17 and Local Union 1503 (collectively, "UMWA") in Eastern's action seeking vacatur of a labor arbitration award. Concluding that the district court correctly decided the issues before it, we affirm.

I.

The present dispute arises out of the National Bituminous Coal Wage Agreement of 1993 ("the Wage Agreement"), a collective bargaining agreement to which Eastern and UMWA are parties. The Wage Agreement reserves exclusively to Eastern the right to hire and discharge employees but provides that "[n]o Employee covered by this Agreement may be disciplined or discharged except for just cause." J.A. 39. Although "just cause" is not defined in the Wage Agreement itself, Eastern's substance abuse policy states that any employee who tests positive for illegal drugs must "be removed from any safety sensitive position and subject to disciplinary action up to and including termination." J.A. 62 (internal quotation marks omitted).

James Smith was employed by Eastern as a mobile equipment operator. In that capacity, Smith was required to have a current commercial driver's license and to operate heavy equipment. On March 25, 1996, Smith was subjected to a random drug test and tested positive for cannabinoids. As a result of the test, he was suspended and eventually discharged. Smith grieved the discharge, and his case proceeded to arbitration. Following a hearing, the arbitrator issued an award returning Smith to work after a 30-day suspension without back pay. In addition, Smith was required to take part in a substance abuse program. The award further required that Smith be subject to random drug testing at the discretion of

either Eastern or an approved substance abuse professional over a five-year period.

Smith tested negative for illegal drugs on three subsequent occasions. However, on June 27, 1997, Smith again tested positive for cannabinoids. Again, he was suspended and subsequently discharged, and again, he grieved the discharge and his case proceeded to arbitration. The arbitrator found that Smith's lapse in his abstinence from recreational drug use was an isolated occurrence caused by a family problem. Accordingly, the arbitrator issued an award suspending Smith through October 29, 1997, but then reinstating him, subject to certain conditions. Those conditions included, *inter alia*, that Smith would receive no back pay, that he would reimburse Eastern and UMWA for the costs of both arbitrations, and that he would provide a signed, undated letter of resignation which would be dated and accepted if he tested positive for any illegal drug, or refused to submit to a drug test, in the following five years.

Eastern sought vacatur of the award in the district court, maintaining that the award does not draw its essence from the Wage Agreement and that it violates a public policy against the use of illegal drugs by persons in safety-sensitive positions. The district court granted summary judgment against Eastern. The court reasoned that because neither the Wage Agreement nor Eastern's substance abuse policy requires that discharge is mandated as the punishment for employees who test positive for illegal drugs, the arbitrator rationally could have concluded that there was not just cause for that punishment under the facts presented here. The court also ruled that the arbitrator's award was not contrary to a well-defined and dominant public policy because although there is a public policy against the use of illegal drugs by those in

safety-sensitive positions, there is no such policy against the reinstatement of employees who have used illegal drugs in the past.

II.

On appeal, Eastern, repeating the arguments it advanced below,[1] contends that the district court erred in granting UMWA's motion for summary judgment. Having had the benefit of oral argument and the parties' briefs, and after careful consideration of the record and the applicable law, we conclude that the district court correctly decided the issues before it. Accordingly, we affirm on the reasoning of the district court. *See Eastern Associated Coal Corp. v. UMWA, District 17*, No. 2:97-0819 (S.D.W.V. Sept. 30, 1998).[2]

AFFIRMED.

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[1] Eastern also argues for the first time in its reply brief that, even if the arbitrator rationally found no just cause for discharge, the arbitrator violated the Wage Agreement by fashioning his own punishment instead of ordering that Smith be reinstated immediately. However, because this argument is advanced for the first time in Eastern's reply brief, it is not properly before this court, and we decline to address it. *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n. 2 (4th Cir. 1996).

[2] UMWA's motion for leave to file an additional responsive memorandum is granted.

APPENDIX B

[Entered Sep. 30, 1998]

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

Civil Action No. 2:97-0819

EASTERN ASSOCIATED COAL CORP.,
Plaintiff

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17, AND LOCAL UNION No. 1503,
Defendants

MEMORANDUM ORDER

This matter is before the court on cross motions for summary judgment filed by the parties pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Plaintiff seeks vacation of an arbitration award. Defendants oppose vacation of the award and seek to have the award confirmed and enforced by the court.

I. *Background*

The following facts are not disputed by the parties. Plaintiff Eastern Associated Coal Corporation ("Eastern") and defendants United Mine Workers of America, District 17, and United Mine Workers of America Local Union 1503 (collectively, "UMWA"), are parties to a collective bargaining agreement known as the National Bituminous Coal Wage Agreement of 1993 (the "Wage Agreement").

Article IA, Section (d) of the Wage Agreement reserves to Eastern the exclusive right to hire and discharge employees. (Plaintiff's Motion for Summary Judgment, Attachment 1). The right of Eastern to discharge employees is limited, however, by Article XXIV, Section (a) of the Wage Agreement, which provides that "[n]o employee covered by this Agreement may be disciplined or discharged except for just cause." (*Id.*). Article XXIV, Section (d)(3) of the Wage Agreement applies to those situations where an employee grieves a discharge and the case proceeds to arbitration. Under such circumstances, Section (d)(3) mandates that:

> If the arbitrator determines that the Employer has failed to establish just cause for the Employee's discharge, the Employee shall be immediately reinstated to his job. If the arbirtator determines that there was just cause for the discharge, the discharge shall become effective upon the date of the arbitrator's decision.

(*Id.*).

Eastern employs a road crew charged with maintaining its mine haulage roads. Members of the road crew hold positions with the company known as Mobile Equipment Operators ("MEO"). Included within the duties performed by MEOs is the operation of equipment having gross vehicle weights ranging from 32,000 to 55,000 pounds on public roads and highways. Operators of such equipment are required to have a commercial driver's license ("CDL") and are subject to certain sections of the Federal Motor Carrier Safety Regulations promulgated by the United States Department of Transportation (the "DOT Regulations").[1] Eastern implemented a random

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[1] The Federal Motor Carrier Safety Regulations, 49 C.F.R. § 382.101 *et seq.*, require that any person required to have a CDL

drug testing policy for its MEO staff in accordance with the DOT Regulations.

In early 1996, James Smith, a drilling operator with Eastern, posted for a vacant MEO position and was eventually hired. In conjunction with his new position, Mr. Smith was required to have a CDL in order to carry out the duties of the job. Pursuant to the DOT Regulations, Mr. Smith was subjected to a random drug test on March 25, 1996. He tested positive for the presence of cannabinoids.[2] In accordance with Article XXIV of the Wage Agreement, Eastern initially suspended Mr. Smith with the intent to discharge and then discharged him. Mr. Smith filed a grievance challenging his discharge and the case proceeded to arbitration.

Arbitrator Jerome H. Ross heard the case and issued an award on April 18, 1996, returning Mr. Smith to work after a 30-day suspension without back pay and requiring Mr. Smith to participate in a substance abuse progam. In addition, the arbitrator's award required Mr. Smith to submit to random drug testing at the discretion of either Eastern or some other approved substance abuse professional for a period of five years.

Mr. Smith was randomly tested again on April 24, 1996, October 11, 1996, and January 27, 1997; each time he tested negative for illegal drug use. On June 27, 1997, Mr. Smith was randomly tested at which time he tested

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submit to controlled substances testing under specific circumstances, including when an employee transfers from a non-CDL position to a CDL position. 49 C.F.R. § 382.301. In addition, the regulations also provide for random drug testing of any person holding a CDL. *Id.* at § 382.305.

[2] Neither the UMWA nor Mr. Smith challenged the results of the March 25, 1996 drug test.

positive for cannabinoids.[3] Eastern again suspended Mr. Smith with intent to discharge and subsequently discharged him. Mr. Smith grieved his discharge and the case proceeded to arbitration in front of Arbitrator Jerome T. Barrett.

The issues before Arbitrator Barrett were framed as follows: (1) "Was the suspension with intent to discharge of grievant James Smith on July 14, 1997 for just cause?" and (2) "And if not, what is the appropriate remedy?" (Defendant's Motion for Summary Judgment, Attachment A at p. 2).

Arbitrator Barrett identified the pertinent portions of the Wage Agreement as follows: (1) Article 1A, Section (d) which reserves to Eastern the exclusive right to hire and discharge its working force; (2) Article III, Section (a) which grants all employees the right to a safe and healthful work environment; (3) Article III, Section (g) which requires Eastern employees to comply with reasonable rules and regulations of Eastern so long as such rules or regulations do not conflict with state and federal laws; and (4) Article XXIV, Sections (a) through (d) regarding Eastern's discharge, grievance and arbitration procedures. (*Id.* at pp. 2-3).

Eastern argued at the arbitration hearing that it had just cause to discharge Mr. Smith as a result of his testing positive for drug use on two separate occasions during a sixteen month period in which time he was employed as a heavy equipment operator. (*Id.* at pp. 3-4). Eastern argued that the DOT Regulations and its own internal drug policy were implemented to curb drug use by employees occupying safety sensitive positions. (*Id.*

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[3] Neither the UMWA nor Mr. Smith challenged the results of the June 27, 1997 drug test.

at p. 3). According to the company, Mr. Smith's drug use jeopardized the safety of other Eastern employees as well as the public at large and made his discharge just under the circumstances. (*Id.* at p. 4). The company further argued that it was proper to discharge Mr. Smith in order to send a clear message to all Eastern employees of the company's serious stance against employee drug use. (*Id.*).

The UMWA countered by citing to Mr. Smith's employment record, noting that the two failed drug tests were the only bad marks on an otherwise exemplary 17-year employment history with Eastern. (*Id.*). The UMWA argued that discharge was too severe a penalty given Mr. Smith's long-term service with Eastern. (*Id.*). Moreover, the union argued that neither Eastern's drug policy nor the DOT Regulations required mandatory discharge of an employee under these circumstances.[4] (*Id.*).

After summarizing the testimony adduced at a hearing held on July 28, 1997, and the positions of the parties, Arbitrator Barrett found that:

> It is understandable why the company wants to put an end to the matter by discharging grievant. The liability the company faces when an employee assigned to operate company equipment on public

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[4] Eastern's Drug and Alcohol Policy and Testing Procedures were entered into evidence by the company at the arbitration hearing. Although the entirety of the drug policy was not entered as part of the record before the court, Eastern cited to paragraph E in its response to the UMWA's motion for summary judgment, filed December 12, 1997. Paragraph E of Eastern's drug policy provides that "[i]f a driver submits a urine specimen for the purpose of a drug test, and the test shows positive levels . . . the driver will be removed from any safety sensitive position and subject to disciplinary action up to and including termination." (Plaintiff's Response to Defendant's Motion for Summary Judgment, at p. 7 n. 3).

> roads is found with drugs in his urine is very real. As is the cost of a second arbitration for the same employee on the same issue within a sixteen month period.
>
> Having been an otherwise solid employee for a significant period of time is certainly in grievant's favor. However, grievant got full credit for his good record in the earlier arbitration. Also to his credit in the earlier case, he was found to be a recreational user of illegal drugs and not an addicted user. Being rescued by an arbitrator from losing his job in 1996 and having to face an invasive program of rehabilitation would seem to have provided unambiguous notice of the need to correct his behavior. It should have been interpreted as a clear message that drug use and secure employment do not mix.
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> * * *
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> Grievant made a very personal appeal under oath to the arbitrator concerning a personal/family problem which caused this one time lapse in drug usage. The arbitrator found this testimony creditable [sic]. If the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught. The remedy provided here will assure that the company and union will not be required to use arbitration again for this grievant where drugs are involved.

(*Id.* at pp. 4-5).

Arbitrator Barrett issued an award suspending Mr. Smith until October 20, 1997, and then reinstating him, subject to the following conditions:

1. No back pay for any loss during this suspension.
2. The award by Arbitrator Ross in CAS No. 93-17-96-472 is reinstated.

3. Grievant will reimburse the company and the union for the arbitrators' bills in both the Ross case and the instant case.

4. Grievant will provide the union and company with a signed, undated letter of resignation which the company may date and accept if grievant tests positive for any illegal drug in the next five years.

5. During the grievant's suspension periods, grievant's name shall remain in the company's random drug testing program. If grievant fails to take a required test during his suspension, the company can date and accept his resignation letter.

6. The company and union may agree that unusual or unforeseen circumstances justify waiving any conditions set forth above.

(*Id.* at p. 6).

In its motion for summary judgment, Eastern seeks vacation of the award on the grounds that the award is contrary to public policy and that it fails to draw its essence from the Wage Agreement. In addition, Eastern contends that Arbitrator Barrett exceeded the authority granted to him pursuant to the Wage Agreement by failing to address the issue of whether Eastern had just cause to discharge Mr. Smith. The UMWA contends in its summary judgment motion that the award did not contravene any well defined and dominant public policy and was based upon the arbitrator's interpretation of the contract so as to draw its essence from the Wage Agreement. Accordingly, the UMWA seeks enforcement of the award.

II. *Discussion*

It is well settled that courts overwhelmingly defer to the arbitrator's resolution of a labor dispute. Under the

United States Supreme Court's *Steelworkers* Trilogy, it is clear that judicial review of labor arbitration awards under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, is extremely limited. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960). In restricting judicial review, the Court has emphasized:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Enterprise Wheel, 363 U.S. at 599. Consequently, courts are not authorized to reconsider the merits of an arbitration award despite allegations by the parties that the award is based upon erroneous facts or a misinterpretation of the underlying contract. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 38.

Nevertheless, the arbitrator may not "ignore the plain language of the contract." *Id.* Rather, the arbitrator's award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Id.* An award fails to draw its essence from the contract "if the arbitrator must have based his award on his own personal notions of right and wrong", *Upshur*

Coals Corp. v. UMWA, Dist. 31, 933 F.2d 225, 229-30 (4th Cir. 1991) (citing *E. I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 614 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986)), or is not "rationally inferable" or "in some logical way" derived from the collective bargaining agreement, *Brotherhood of R.R. Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970). An award does not draw its essence from the collective bargaining agreement if the award conflicts with the express terms of the contract, *Vic Wertz Distrib. Co. v. Teamsters Local 1038, Nat'l Conf. of Brewery Workers*, 898 F.2d 1136, 1141-43 (6th Cir. 1990), or the meaning given to clear and unequivocal contract language by the arbitrator is "other than that expressed by the agreement." *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940, 944 (1st Cir. 1988).

In determining whether an award draws its essence from the collective bargaining agreement, it is also appropriate to consider whether the arbitrator exceeded his contractual authority. *Delta Queen Steamboat Co. v. District 2 Maine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990). When a collective bargaining agreement provides that disciplinary rights are reserved exclusively to management, and specifies conduct that warrants discharge, the arbitrator may not infringe on those rights by modifying the discipline imposed. *Warrior & Gulf Navigation Co. v. United Steelworkers of America*, 996 F.2d 279 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994) (where agreement provides for immediate discharge of employee who tests positive for drugs a second time, arbitrator, on finding that second positive test was legitimate, may not reduce penalty to disciplinary suspension); *Delta Queen*,

889 F.2d 599 (where agreement reserves to management the sole responsibility to discipline and discharge for proper cause, such as carelessness, and the arbitrator finds "grossly careless" conduct by discharged employee, the arbitrator may not award reinstatement notwithstanding his belief that discharge was unfair in light of the employee's long-standing service); *Georgia-Pacific*, 864 F.2d 940, 944-46 (where agreement provides for immediate discharge for dishonesty and arbitrator makes factual finding of dishonesty, he may not award reinstatement on the reasoning that employee's years of faithful performance constitute a "countervailing factor" entitling him to at least one opportunity to correct his ways before being discharged).

In those instances where the collective bargaining agreement does not specify the conduct that constitutes cause for discharge, arbitrators may look to other sources for guidance. Among the sources deemed to be an integral part of the agreement are management work rules and disciplinary enforcement policies and practices. *Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, Int'l Bhd. of Boilermakers*, 671 F.2d 797, 799-800 (4th Cir. 1982); *see also Brigham & Women's Hosp. v. Massachusetts Nurses Assoc.*, 684 F. Supp. 1120, 1123-24 (D. Mass. 1988) (where agreement gave employer right to discharge for "just cause," arbitrator properly looked to hospital's disciplinary policy to determine meaning of the term). Indeed, it is held that where the collective bargaining agreement reserves to management the right to make and enforce disciplinary rules, rules promulgated pursuant to that authority are thus incorporated into the collective bargaining agreement and have "the force of contract language." *General Drivers, Warehousemen & Helpers Local Union 968 v. Sysco Food Services, Inc.*, 838 F.2d 794, 799 nn. 1, 4 (5th Cir. 1988). Where a

collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for cause, but does not set out what constitutes just cause, it is proper for the arbitrator to look to company rules and regulations to determine whether or not a discharge was warranted. *Posadas de Puerto Rico Assoc., Inc. v. Union de Trabajadores de la Industria Gastronomica, Local 610*, 670 F. Supp. 58, 63 (D.P.R. 1987).

Here, the collective bargaining agreement between Eastern and the UMWA reserves to Eastern the right to implement reasonable rules and regulations not inconsistent with federal and state laws. Eastern's drug policy was implemented by the company in accordance with its reserved right to implement rules and regulations. Consequently, it must be deemed an integral part of the collective bargaining agreement. *See General Drivers, Warehousemen & Helpers Local Union 968*, 838 F.2d at 796, 799 nn. 1, 4. For its part, Eastern has asserted as much in its brief before the court.[5] Moreover, the UMWA has not challenged Eastern's right under the collective bargaining agreement to impose the drug policy, adopted by Eastern primarily for the purpose of complying with the DOT Regulations. In fact, the UMWA relied upon the drug policy during the arbitration proceeding as support for its position that discharge was inappropriate under the circumstances.

Under the Wage Agreement, Eastern has the exclusive right to direct its work force, including the right to hire and discharge its employees. Eastern's right to discharge

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[5] In its memorandum in support of its motion for summary judgment, Eastern asserted that its substance abuse policy "must be deemed an integral part of the collective bargaining agreement." (Plaintiff's Memorandum in Support of Motion for Summary Judgment, at p. 12).

employees is limited, however, to those situations where the company has just cause. The term "just cause" is not defined in the Wage Agreement itself. Thus, Arbitrator Barrett was obligated to look to other sources, including the company's substance abuse policy, for guidance in determining whether Mr. Smith's discharge was warranted. Eastern's substance abuse policy requires that an employee who tests positive for drugs be "removed from any safety sensitive position and subject to disciplinary action up to and including termination." *See supra* page 6, n. 4.

Having decided that the substance abuse policy is an integral part of the Wage Agreement, any decision made by the arbitrator pursuant to the disciplinary standard set forth within the company's substance abuse policy would be appropriate. Although Arbitrator Barrett did not specifically find the existence of just cause to discharge Mr. Smith, a reading of his entire opinion leads the court to conclude that he found just cause to discipline Mr. Smith, in accordance with the terms of the substance abuse policy. Specifically, Arbitrator Barrett suspended Mr. Smith for two and one-half months without pay, then reinstated him subject to several conditions, including continuation of random drug testing for a period of five years as well as mandatory resignation in the event of any future positive drug test. Based upon this award, it appears as though Arbitrator Barrett interpreted the substance abuse policy to allow for suspension and discipline. Inasmuch as the substance abuse policy calls for the removal of employees in safety sensitive positions, but does not call for mandatory discharge, the court finds that the arbitrator's award, suspending Mr. Smith for two and one-half months without pay, and reinstating him subject to strict conditions, is "rationally inferable" from the Wage Agreement. Having found that the award is rationally inferable from the Wage

Agreement, the court does not find that Arbitrator Barrett exceeded his authority under the agreement.

Eastern argues that *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, No. 2:93-0862 (S.D. W. Va. February 27, 1995), *aff'd*, 76 F.3d 606 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 80 (1996), is controlling in this action, and requires the court to vacate the arbitrator's award on the ground that it represents the arbitrator's own brand of industrial justice and does not draw its essence from the Wage Agreement. However, the facts of this case are to be distinguished from those before the court in *Mountaineer*. In *Mountaineer*, the company's substance abuse policy contained a provision requiring immediate termination of any employee testing positive for drug use. Here, Eastern's substance abuse policy does not require mandatory termination. Rather, the policy requires discipline "up to and including termination." The disciplinary standard embodied within Eastern's substance abuse policy differentiates this case from *Mountaineer*. Accordingly, the court finds that Arbitrator Barrett's award draws its essence from the Wage Agreement and does not represent his own "brand of industrial justice."

Eastern also argues that Arbitrator Barrett's award should be set aside on public policy grounds. The question of public policy is "ultimately one for resolution by the courts." *Misco*, 484 U.S. 29, 43. However, courts should be reluctant to vacate arbitration awards on public policy grounds. *Id.* Therefore, an arbitrator's award should be set aside only in those situations "where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant' ". *Id.* (quoting *W.R. Grace & Co. v. Int'l Union of United Rubber Workers*, 461 U.S. 757, 767 (1983)). A well defined and dominant public policy is one that may "be ascertained by reference to the laws and legal precedents and not

from general considerations of supposed public interests." *Id.* Consequently, a "formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement." *Id.* at 44. Thus, to vacate an arbitration award on public policy grounds, the court must find that "an explicit, well defined and dominant public policy exists and the policy is one that specifically militates against the relief ordered by the arbitrator." *United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1995) (quoting *Arizona Elec. Power Coop., Inc. v. Berkeley*, 59 F.3d 988, 992 (9th Cir. 1995)).

In this action, Eastern argues that the DOT Regulations articulate a well defined and dominant public policy against the operation of dangerous machinery by employees who test positive for drug use. The DOT Regulations were promulgated to encourage employers "to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." 49 C.F.R. § 382.101 (1998). According to Eastern, the DOT Regulations were enacted primarily to protect the public from injury and necessarily cover those situations where an employee tests positive for drug use despite a lack of evidence that he was under the influence of drugs while operating heavy equipment.

The court must first determine whether or not there is a well defined and dominant public policy militating against the arbitrator's decision in this case. There is a plentitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs. *See, e.g., Gulf Coast Indus. Workers*

Union v. Exxon Corp., 991 F.2d 244, 252-53 (5th Cir. 1993) (recognizing that numerous statutes, regulations, and judicial opinions "pronounce the emphatic national desire to eradicate illicit drugs from the workplace," particularly in safety sensitive occupations); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 855-56 (5th Cir. 1996) (finding within the Federal Railroad Administration regulations a well defined and dominant public policy against the performance of safety sensitive jobs while under the influence of drugs); *Union Pacific R.R. Co. v. United Transp. Union*, 3 F.3d 255, 262 (8th Cir. 1993) (court concluded that Federal Railroad Administration regulations incorporate a well defined and dominant public policy against permitting railroad employees to perform their jobs while under the influence of intoxicants); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665, 674 (11th Cir. 1988) (court recognized clear established public policy contained within Federal Aviation Administration regulations condemning operation of passenger airliners by pilots under the influence of drugs or alcohol).

Additionally, there is legal precedent which expands this public policy from situations where the employee is shown to be under the influence of drugs to situations where the employee merely tests positive for drugs although there is no evidence that he was under the influence while on the job. *See Exxon Corp. v. Esso Workers Union, Inc.*, 118 F.3d 841 (1st Cir. 1997) (holding that reinstatement of employee in safety sensitive job who failed drug test violated public policy embodied within the Drug-Free Workplace Act despite lack of evidence that employee was under influence of drugs at work); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 856 (5th Cir. 1996) (holding that allowing

employee to collect back pay would contravene public policy contained within Federal Railroad Administration regulations despite the absence of any evidence that employee had actually performed his job while drug-impaired).

Based upon the foregoing, the court finds that a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs. Thus, Eastern has satisfactorily negotiated the first step of the public policy analysis. To abandon Arbitrator Barrett's award as contrary to public policy, however, the court must also find that his award of reinstatement contravenes the identified policy. *Exxon Corp. v. Esso Workers Union, Inc.*, 118 F.3d at 849. Eastern argues that the public policy embodied in the DOT Regulations is sufficiently well defined and dominant to support vacation of Arbitrator Barrett's award. There is no question that the DOT Regulations relied upon by Eastern articulate a well defined and dominant public policy against drug use by persons employed as commercial motor vehicle drivers.[6] Nevertheless, the DOT Regulations do not express an explicit, well defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use. Specifically, the DOT Regulations do not require that employees who test positive for drug use be automatically

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[6] The purpose of the DOT Regulations is to encourage employers "to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." 49 C.F.R. § 382.101. The DOT Regulations also indicate that the purpose behind the CDL requirement is "to help reduce or prevent truck and bus accidents, fatalities, and injuries by requiring drivers to have a single commercial motor vehicle driver's license and by disqualifying drivers who operate commercial motor vehicles in an unsafe manner." *Id.* at § 383.1.

discharged. Here, the arbitrator ordered reinstatement of Mr. Smith, subject, however, to several conditions, including continued random drug testing and mandatory resignation in the event of a future positive drug test. Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use, it cannot be said that the DOT Regulations "specifically militate against the relief ordered by the arbitrator" in this case. *United Food & Commercial Workers Int'l Union, Local 588*, 74 F.3d at 174. Consequently, the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations.

III. *Conclusion*

For the reasons stated, it is ORDERED that defendants' motion for summary judgment be, and it hereby is, granted. Accordingly, it is further ORDERED that plaintiff's motion for summary judgment be, and it hereby is, denied.

The Clerk is directed to forward copies of this order to all counsel of record.

Dated September 30, 1998

/s/ John T. Copenhaver, Jr.
JOHN T. COPENHAVER, JR.
United States District Judge

APPENDIX C

FILED September 20, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2527
CA-97-819-2

EASTERN ASSOCIATED COAL COMPANY,
Plaintiff-Appellant

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Defendants-Appellees

ON PETITION FOR REHEARING
AND REHEARING EN BANC

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX D

ARBITRATION AWARD

Re: 93-17-97-737
Issue: Discharge
Grievant: James Smith

In the Matter of
EASTERN ASSOCIATED COAL CORP.

and

UNITED MINE WORKERS OF AMERICA
DISTRICT 17, LOCAL 1503

This is an arbitration pursuant to the CAS rules created by the parties to the National Agreement of the BCOA and UMWA. On July 28, 1997, a hearing was held in the Honey-In-The-Rock Motel at Beckley, West Virginia before the undersigned arbitrator. Since this is a discharge case and a bench award was required, it was issued orally within two hours after the conclusion of the hearing.

At the hearing, each party was afforded an opportunity to present witnesses and evidence, and to examine and cross-examine witnesses. The parties submitted four joint exhibits: the wage agreement, the grievance, the suspension letter and DOT regulations. The company presented 15 exhibits including 11 arbitration awards. The union presented 10 exhibits, all arbitration awards. Each party provided testimony from one witness.

The Grievance

On July 17, 1997, James Smith filed a timely grievance which stated:

"I have been suspended with intent to discharge. Management cannot show just cause in this case. I ask to be reinstated to my job with all lost wages and benefits." (Jt. Exh. 2.)

The suspension letter, dated July 14, 1997, gave the following reason for the company action:

"Testing positive for illegal substances (cannabinoids) 2nd offense. Violation of company's drug and alcohol policy. (Jt. Exh. 3)

The Issue

The issue before the arbitrator is:

Was the suspension with intent to discharge of grievant James Smith on July 14, 1997 for just cause?

And, if not, what is the appropriate remedy?

Relevant Contractual Provisions and Policies

Art. IA Scope and Coverage

Section (d) Management of the Mine

The management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer.

Art. III Health and Safety

Section (a) Right to a Safe Workplace

Every employee covered by this agreement is entitled to a safe and healthful place to work, and the parties jointly pledge their individual and joint efforts to attain and maintain this objective.

Section (g) Safety Rules and Regulations

Reasonable rules and regulations of the employer, not inconsistent with federal and state laws, for the protection of the persons of the employees and preservation of property shall be complied with.

Art. XXIV Discharge Procedures

Section (a) Just Cause Requirement

Section (b) Procedures

Section (c) Suspension

Section (d) Immediate Arbitration

Background

The factual basis for this grievance are as follows:

In January 1996 DOT regulation (Jt. Exh. 4) began requiring that drivers of commercial vehicles be subject to testing for illegal drug use. In March 1996, grievant tested positive for an illegal drug (cannabinoids). Between providing a test sample and hearing the results of the test, the grievant sought assistance from the company because he believed the test would be positive. An employee assistance company interviewed the grievant and determined that he was a recreational user not an addicted user. Even before an arbitration hearing on his grievance, concerning a notice of suspension with intent to discharge, the grievant attended several sessions with the employee assistance counsel concerning his use of illegal drugs.

The arbitration resulted in grievant being returned to work after 30 days with no back pay and required him to participate in a substance abuse program, plus subjecting him to testing at the discretion of the company or the substance abuse program for five years. (Co. Exh. 3)

Subsequently, grievant tested negative on April 24, 1996, July 16, 1996, October 11, 1996, and January 27, 1997. On June 27, 1997, grievant was tested as part of the company's random testing program to which all employees are subjected. His test was positive. The company's action based on that test lead to the instant case.

Company Position

The company takes seriously the wage agreement language on providing a safe work place. The company believes that that safety requirement extends to the public using public roads. The company is also concerned about the liability exposure for allowing an impaired employee to drive company equipment on public roads. Both the company policy on drug use and the DOT regulations place an obligation on the company.

This is the grievant's second offense in a 16 month period. While grievant has been a very good employee during his 17 years with the company, it is obvious he has not been rehabilitated by the opportunity provided by the company's employee assistance program or the earlier arbitration.

The company has the behavior of other employees to consider in this matter. Other employees must see the negative consequences of drug use. Therefore, the company's action in this matter is reasonable and it meets the just cause standards.

Union Position

The grievant has had an excellent employment record during 17 years with the company. The incident in April 1996 and in July 1997 are the only two problems he has ever had while employed by the company. A company witness has confirmed this. Should the grievant be re-

placed by a miner from the panel, the employer would not get as good an employee as the grievant.

While the grievant is guilty as charged, there are mitigating circumstances which make discharge too extreme a penalty. Given the grievant's excellent employment record and the mitigation circumstance, of a personal/family nature, the grievant should be given a lesser penalty than discharge.

Neither the company's drug and alcohol policy nor the DOT regulations require the termination of an employee under the circumstances of this case. (Co. Exh. 5 and Jt. Exh. 4)

Discussion and Opinion

The record is clear that the company has made a good faith effort through it's employee assistance program to rehabilitate the grievant. From April 1996 to July 1997, the grievant appeared to be making a good faith effort to be rehabilitated. His failure to stay drug free is disappointing to everyone concerned. It is understandable why the company wants to put an end to the matter by discharging grievant. The liability the company faces when an employee assigned to operate company equipment on public roads is found with drugs in his urine is very real. As is the cost of a second arbitration for the same employee on the same issue within a sixteen month period.

Having been an otherwise solid employee for a significant period of time is certainly in grievant's favor. However, grievant got full credit for his good record in the earlier arbitration. Also to his credit in the earlier case, he was found to be a recreational user of illegal drugs and not an addicted user. Being rescued by an arbitrator from losing his job in 1996 and having to face an invasive

program of rehabilitation would seem to have provided unambiguous notice of the need to correct his behavior. It should have been interpreted as a clear message that drug use and secure employment do not mix.

In the earlier case, the arbitrator makes two references to the grievant's and the union's view of drug testing. He said:

> "In this regard, the Union observed that the grievant did not believe he would be required to submit to a pre-employment drug test, because in his Core Driller position he had been performing duties covered under the (DOT) Regulations."
>
> (page 4 of Co. Exh. 3)

> "I find unpersuasive the Union's argument that the grievant would not have smoked marijuana if he believed that drug testing would be required in conjunction with assuming the duties of the Mobile Equipment Operator position."
>
> (page 6 of Co. Exh. 3)

This is very faulty thinking on the part of both the union and the grievant. One does not avoid using illegal drugs because one might be tested. One avoids them because drugs have a negative impact on job performance, safety and company liability. Drugs and work simply don't mix.

Grievant made a very personal appeal under oath to the arbitrator concerning a personal/family problem which caused this one time lapse in drug usage. The arbitrator found this testimony creditable. If the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught. The remedy provided here will assure that the company and union will not be required to use arbitration again for this grievant where drugs are involved.

In the counseling resulting from this award, grievant is urged to handle both the personal/family problems along with the drug use problem.

Based on this discussion and opinion, the following award is made:

Award

The grievance is sustained and the grievant is returned to work on October 20, 1997 under the following conditions:

1. No back pay for any loss during this suspension.

2. The award by Arbitrator Ross in CAS No. 93-17-96-472 is reinstated.

3. Grievant will reimburse the company and the union for the arbitrators' bills in both the Ross case and the instant case.

4. Grievant will provide the union and company with a signed, undated letter of resignation which the company may date and accept if grievant tests positive for any illegal drug in the next five years.

5. During the grievant's suspension period, grievant's name shall remain in the company's random drug testing program. If grievant fails to take a required test during his suspension, the company can date and accept his resignation letter.

6. The company and union may agree that unusual or unforeseen circumstances justify waiving any conditions set forth above.

/s/ Jerome T. Barrett
JEROME T. BARRETT
Arbitrator
Falls Church, Virginia

Dated: August 1, 1997

APPENDIX E

REGULATORY PROVISIONS INVOLVED

Selected portions of Title 49 of the Code of Federal Regulations

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

§ 382.101 Purpose.

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

§ 382.103 Applicability.

(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:

(1) The commercial driver's license requirements of part 383 of this subchapter;

(2) The Licencia Federal de Conductor (Mexico) requirements; or

(3) The commercial driver's license requirements of the Canadian National Safety Code.

* * * *

§ 382.201 Alcohol concentration.

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having actual knowledge that a driver has an alcohol concentration of 0.04 or greater shall permit the

driver to perform or continue to perform safety-sensitive functions.

§ 382.205 On-duty use.

No driver shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a driver is using alcohol while performing safety-sensitive functions shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.207 Pre-duty use.

No driver shall perform safety-sensitive functions within four hours after using alcohol. No employer having actual knowledge that a driver has used alcohol within four hours shall permit a driver to perform or continue to perform safety-sensitive functions.

§ 382.209 Use following an accident.

No driver required to take a post-accident alcohol test under § 382.303 of this part shall use alcohol for eight hours following the accident, or until he/she undergoes a post-accident alcohol test, whichever occurs first.

§ 382.211 Refusal to submit to a required alcohol or controlled substances test.

No driver shall refuse to submit to a post-accident alcohol or controlled substances test required under § 382.303, a random alcohol or controlled substances test required under § 382.305, a reasonable suspicion alcohol or controlled substances test required under § 382.307, or a follow-up alcohol or controlled substances test required under § 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

§ 382.213 Controlled substances use.

(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in § 382.107 of this part, who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

(b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(c) An employer may require a driver to inform the employer of any therapeutic drug use.

§ 382.215 Controlled substances testing.

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances. No employer having actual knowledge that a driver has tested positive for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.301 Pre-employment testing.

(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for alcohol and controlled substances as a condition prior to being used, unless the employer uses the exception in paragraphs (c) and (d) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the driver has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04,

and has received a controlled substances test result from the MRO indicating a verified negative test result. If a pre-employment alcohol test result under this section indicates an alcohol content of 0.02 or greater but less than 0.04, the provision of § 382.505 shall apply.

* * * *

§ 382.305 Random testing.

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(b)(1) Except as provided in paragraphs (c) through (e) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of the average number of driver positions.

(2) Except as provided in paragraphs (f) through (h) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

* * * *

(i) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall have an equal chance of being tested each time selections are made.

(j) The employer shall randomly select a sufficient number of drivers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol and controlled sub-

stances testing determined by the FHWA Administrator. If the employer conducts random testing for alcohol and/or controlled substances through a consortium, the number of drivers to be tested may be calculated for each individual employer or may be based on the total number of drivers covered by the consortium who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part or any DOT alcohol or controlled substances random testing rule.

(k) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced and that the dates for administering random alcohol and controlled substances tests are spread reasonably throughout the calendar year.

(l) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(m) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(n) If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar

year by the DOT agency regulating more than 50 percent of the driver's function.

(o) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject.

§ 382.307 Reasonable suspicion testing.

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with § 382.603 of this part. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

(d) Alcohol testing is authorized by this section only if the observations required by paragraph (a) of this section are made during, just preceding, or just after the period of the work day that the driver is required to be in compliance with this part. A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(e)(1) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (a) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (a) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(2) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FHWA each record of a test required by this section that is not completed within 8 hours. The employer's records of tests that could not be completed within 8 hours shall be sub-

mitted to the FHWA by March 15, 1996; March 15, 1997; and March 15, 1998; for calendar years 1995, 1996, and 1997, respectively. Employers shall append these records to their MIS submissions. Each record shall include the following information:

(i) Type of test (reasonable suspicion/post-accident);

(ii) Triggering event (including date, time, and location);

(iii) Reason(s) test could not be completed within 8 hours; and

(iv) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred.

(3) Records of tests that could not be completed in eight hours shall be submitted to the FHWA at the following address: Attn.: Alcohol Testing program, Office of Motor Carrier Research and Standards (MSC-1), Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

(4) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or

(ii) Twenty four hours have elapsed following the determination under paragraph (a) of this section that there

is reasonable suspicion to believe that the driver has violated the prohibitions in this part concerning the use of alcohol.

(5) Except as provided in paragraph (e)(2) of this section, no employer shall take any action under this part against a driver based solely on the driver's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test. This does not prohibit an employer with independent authority of this part from taking any action otherwise consistent with law.

(f) A written record shall be made of the observations leading to a controlled substance reasonable suspicion test, and signed by the supervisor or company official who made the observations, within 24 hours of the observed behavior or before the results of the controlled substances test are released, whichever is earlier.

§ 382.309 Return-to-duty testing.

(a) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning alcohol, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning controlled substances, the driver shall undergo a return-to-duty controlled substances test with a result indicating a verified negative result for controlled substances use.

§ 382.311 Follow-up testing.

(a) Following a determination under § 382.605(b) that a driver is in need of assistance in resolving problems

associated with alcohol misuse and/or use of controlled substances, each employer shall ensure that the driver is subject to unannounced follow-up alcohol and/or controlled substances testing as directed by a substance abuse professional in accordance with the provisions of § 382.605(c)(2)(ii).

(b) Follow-up alcohol testing shall be conducted only when the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing safety-sensitive functions.

* * * *

§ 382.501 Removal from safety-sensitive function.

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol or controlled substances rule of another DOT agency.

(b) No employer shall permit any driver to perform safety-sensitive functions, including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section.

(c) For purposes of this subpart, commercial motor vehicle means a commercial motor vehicle in commerce as defined in § 382.107, and a commercial motor vehicle in interstate commerce as defined in Part 390 of this subchapter.

§ 382.503 Required evaluation and testing.

No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive func-

tions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605.

§ 382.505 Other alcohol-related conduct.

(a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, including driving a commercial motor vehicle, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

§ 382.507 Penalties.

Any employer or driver who violates the requirements of this part shall be subject to the penalty provisions of 49 U.S.C. section 521(b).